

10-28-2014

# Heilman v. State Appellant's Brief 2 Dckt. 41240

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

DENNIS RAYMOND HEILMAN, )  
 )  
Petitioner-Appellant, )  
 )  
v. )  
 )  
STATE OF IDAHO, )  
 )  
Respondent. )  
\_\_\_\_\_ )

No. 41240

Nez Perce Cty. Case No. CV-11-1323

APPELLANT'S REPLY BRIEF

\_\_\_\_\_  
BRIEF OF APPELLANT  
\_\_\_\_\_

APPEAL FROM THE DISTRICT COURT OF THE second JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF NEZ PERCE  
\_\_\_\_\_

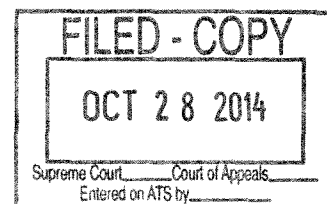
HONORABLE CARL B. KERRICK  
District Judge  
\_\_\_\_\_

STEPHEN D. THOMPSON  
Attorney for Defendant/Appellant  
I.S.B. # 5714  
P.O. Box 1707  
Ketchum, Idaho 83340  
(208)726-4518

ATTORNEY FOR  
PETITIONER-APPELLANT

KENNETH K. JORGENSEN  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

ATTORNEY FOR  
RESPONDENT



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## **I. STATEMENT OF THE CASE**

### **A. Nature of the Case**

Dennis Raymond Heilman appeals from the district court's Opinion and Order on Motion for Summary Disposition filed November 28, 2012, of his successive petition for post conviction, and the Order Denying Motion to Reconsider, and Final Judgement thereon. (R., pp. 116-130). Mr. Heilman asserts that the district court erred by summarily dismissing his petition for post-conviction relief.

### **B. Statement of the Facts & Course of Proceedings**

The statement of the facts and course of proceedings were previously articulated in Mr. Nichol's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## **II. ISSUES PRESENTED ON APPEAL**

- A. Did the district court err when it summarily dismissed Mr. Heilman's Successive Petition for Post-Conviction Relief?**

## **III. ARGUMENT**

### **A.**

- A. The District Court Erred when it summarily dismissed Mr. Heilman's Successive Petition for Post-Conviction Relief.**

As stated in Mr. Heilman's opening brief, a petition for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is a civil action in nature.

*Workman v. State*, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). Under Idaho Code §

19-4903, the petitioner must prove the claims upon which the petition is based by a preponderance of the evidence. *Workman*, 144 Idaho at 522, 164 P.3d at 802.

Mr. Heilman restates that summary dismissal of an application is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, the court must determine whether a genuine issue of fact exists based on the pleading, deposition, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

The Idaho Supreme Court has stated that,

A petition for post-conviction relief, based on a claim of ineffective assistance of counsel, will accordingly survive a motion for summary dismissal if the petitioner establishes: (1) a material issue of fact exists as to whether counsel's performance was deficient; and (2) a material issue of fact exists as to whether the deficiency prejudiced petitioner's case. *Saykhamchone*, 127 Idaho at 323, 900 P.2d at 799 (citing *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992)).

*Pratt v. State*, 134 Idaho 581, 583-84, 6 P.3d 831, 833-84 (2000).

If the petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, the post-conviction claim may not be

summarily dismissed. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004).

To prevail on an ineffective assistance of counsel claim in a post-conviction action, one must show that his or her attorney's performance was deficient, and that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Suits v. State*, 143 Idaho 160, 162, 139 P.3d 762, 764 (Ct. App. 2006). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.*

Respondent contends that Mr. Heilman did not challenge the district court's findings with regard to its dismissal of his appeal. First, the district court did not issue "findings" but rather summarily dismissed Mr. Heilman's post-conviction claims without hearing. Further, the arguments in Mr. Heilman's opening brief, and the below arguments, demonstrate that contention not to be true.

A review of Mr. Heilman's opening brief, and of the record herein reveals that Mr. Heilman raised substantial facts in his verified petition (R. pps. 21-22) and affidavit verifying that the facts as alleged in this petition were true, (R. p. 26) regarding ineffective assistance of counsel both at the trial and appellate levels. Nonetheless, the district court ruled with regard to Mr. Heilman's claims that they were unsupported by

sufficient facts and evidence. Mindful of that position, Mr. Heilman argues that he supported his claims via his verified petition, and an affidavit further verifying his facts. Therefore, Mr. Heilman contends that he raised issues of material fact with regard to the performance of his trial and appellate attorneys, and material issues regarding the effect of the deficient performances on his case. His specific contentions are discussed below.

a. As noted previously, Mr. Heilman first contended there was a deficient failure to object to prosecutorial misconduct at trial in the form of the prosecutor mis-stating the elements of the crime of rape. Mr. Heilman contends that this claim should have been a subject of the motion for a new trial or, failing that, of his direct appeal. As stated in his verified pleadings, and as argued by post-conviction counsel (Tr., p.12, Lines 8 – 20), this did not occur. Such a failure raises squarely material issues whether counsel's performance was deficient, and whether said the deficiency prejudiced Mr. Heilman's case. As Mr. Heilman presented verified statements regarding those failures, that claim should not have been dismissed. Mr. Heilman contends that this failure on the part of his counsel was fell below an objective standard of reasonableness because a reasonable advocate would have properly objected. Further, he contends that there is a reasonable probability that by leaving the incorrect statement to stand unchallenged, the jury may have been mislead or confused.

b. Next, Mr. Heilman contended that his trial attorney failed to properly deal with witness perjury involving testimony about marijuana use, and failed to secure a urinalysis showing the results were inconsistent with the testimony. Mr. Heilman also claimed in his verified petition that Defense counsel at trial failed to have an expert



witness available to deal with testimony regarding the alleged victim's marijuana use and failed to have an expert available to contradict said testimony and thus attack the witness's credibility. Mr. Heilman contends that this was inadequate representation at the trial level and that his verified petition in this regard presented material issues regarding the sufficiency of the performance and whether said deficiency prejudiced his case. The unchallenged witness credibility and failure to contradict the witness with expert testimony both fell below objective standards of reasonableness, and was likely to have allowed the jury to draw conclusions it would not have had the correct actions been taken. Further, this issue was not raised on appeal, revealing a material issue of fact regarding appellate counsel's performance.

c. Next, Mr. Heilman argues that trial counsel was ineffective because he failed to adequately question Penny Heilman about inconsistencies between her testimony at trial and her statements made to the police in an interview, which was recoded and could have been played for the jury. Again, Mr. Heilman provided his verified petition regarding this claim, and therefore argues he presented facts demonstrating material issues regarding deficient performance and detrimental effect on his case due to the failure to challenge the credibility of the witness that required hearing rather than summary disposition.

d. Mr. Heilman next claimed via his verified petition that trial counsel was ineffective by failing to request instructions on exhibition or use of a deadly weapon and aiming a firearm at others as lesser included offenses and for failing to request an instruction based on Idaho Code §18-6107, which deals with the definition of rape as between spouses.

As noted by the district court, and as argued previously in Mr. Heilman's opening brief, the effectiveness of counsel with regard to correctness of jury instructions can be considered in post conviction. *McKay v. State*, 145 Idaho 67, 570, 225 P.3d 700, 702 (2010). However, the district court ruled that this allegation was not supported. Mindful of that position, Mr. Heilman argues that he provided the court with verified statements of fact in his petition which support what occurred, and therefore raise material questions regarding deficient legal performance, and regarding the effect that that performance had on his case. Particularly, Mr. Heilman is concerned about how the jury was instructed regarding the definition of rape as between spouses, and Idaho Code § 18-1607. He contends that his counsel's failure to request the appropriate instructions likely confused the jury, and also likely prevented the jury from finding the lesser included offenses.

e. Mr. Heilman also contends that trial counsel was ineffective by failing to object to Court's Instruction No. 13, as given. This instruction stated, "Although PENNY HEILMAN must have resisted the act of penetration, the amount of resistance need only be such as would show the victim's lack of consent to the act." Mr. Heilman, mindful of the fact that this instruction is similar to the ICJI Instruction 904 in effect at the time of his trial, argues that the failure of his trial attorney to object to this instruction and/or provide a different instruction constituted ineffectiveness of counsel. His contention is that this instruction does not properly advise the jury considering Idaho Code § 18-1607. He therefore contends that he raised sufficient facts to require a hearing rather than summary disposition.

f. Mr. Heilman next contends that his defense counsel at trial was ineffective for

failing to point out the jury that the picture of a gun holster sitting in the basement was inconsistent with other testimony, including the fact that Penny Heilman stated that the pistol was pointed at her, was not in a holster and that the plaintiff (defendant at trial) was clad only in briefs, no belt, and could not have used a holster. Mr. Heilman contends that his verified statements in this regard are specific enough to raise material questions regarding deficient performance and its effect on his proceedings, therefore requiring a hearing. Mr. Heilman contends that his counsel's failure to take these actions probably allowed the jury to be mislead, or at least did not point out the inconsistencies in the State's case.

g. Mr. Heilman also contends that his attorney in his first post-conviction was ineffective in by failing to properly and sufficiently argue in his first post-conviction relief proceeding that trial counsel did not inform his client that he was not obligated to incriminate himself by cooperating with the psycho-sexual evaluation and also for not being present at that evaluation or any stage of the P.S.I.

An "allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005). Thus, a petitioner asserting ineffective assistance of prior post-conviction counsel as the "sufficient reason" for failing to adequately assert a claim in the original post-conviction action must satisfy a two-level burden of proof. First, the petitioner must demonstrate that ineffective assistance of post-conviction counsel caused the inadequate presentation of a claim in

the first petition. See *id.* Second, the petitioner must prove the underlying claim that was inadequately presented and upon which relief is sought. See *Workman*, 144 Idaho at 522, 164 P.3d at 802.

It is Mr. Heilman's position that this claim was not adequately presented in his first post-conviction, and that therefore the performance of counsel in this regard was deficient, and that the deficient performance resulted in the dismissal of that claim. He contends that this failure is both objectively unreasonable and also probably caused the dismissal of his claim. It is further Mr. Heilman's position that appellate counsel did not properly argue this point on appeal, and therefore said claim was lost. Therefore, he contends he raised sufficient facts to warrant a hearing in regards to this claim, and that the district court erred by summarily dismissing it on the basis that it was previously ruled upon.

h. Mr. Heilman also contends that his appellate attorneys rendered deficient performance by failing to include many of the issues raised on his behalf in an earlier notice of appeal that was subsequently amended by appellate counsel. These issues include the failure to raise issues regarding the subpoena of a juror, denial of the defense motion for a new trial, and information regarding the alleged victim's employment background. Because they were not raised, those claims were lost. Mr. Heilman submits that through his verified petition and related pleadings, he raised material questions regard deficient performance and the effect said performance had on his proceedings, and therefore should have received a hearing on the issues.

i. Mr. Heilman further contends that the office of the State Appellate Public

Defender was further ineffective because it failed to raise the question of the admission of testimony submitted at trial relative to the parties' divorce and failed file a reply brief on appeal and that it failed to argue, on appeal, even some of the issues raised in the timely filed notice of appeal. He argues that without the petitioner's permission, the State Appellate Public Defender failed to argue some of the issues the petitioner wanted raised on appeal. Consequently, his claims he desired to pursue were lost. Again, Mr. Heilman contends that his verified pleadings raise sufficient facts to require a hearing on the issue.

j. Mr. Heilman further contends that his claim regarding speedy trial and the fact that he neither waived nor received a speedy trial, was not effectively argued on appeal, nor in his first post-conviction. Because they were not effectively argued, they were lost. In accordance with the law previously set forth in paragraph 1(g), Mr. Heilman argues that he has raised facts regarding the prior ineffective representation regarding that claim sufficient to require a hearing as opposed to summary disposition.

k. Mr. Heilman also argues that he set forth sufficient facts to survive summary disposition in accordance with the law above cited with regard to his claim that his trial counsel was ineffective for failure to poll the jury.

l. Finally, Mr. Heilman argues that he received ineffective assistance of counsel when his prior appellate counsel failed to appeal, or prosecute the appeal, for the denial of his motion for new trial, which is an important issue to the petitioner. Because it was not pursued, said claim was lost. Again, Mr. Heilman submits that his verified pleadings raise material issues concerning this claim that should have warranted an evidentiary

hearing as opposed to summary disposition.

As stated above, summary dismissal of an application is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

Contrary to the Respondent's assertions, Mr. Heilman contends that he raised substantial facts in his pleadings (See R., pp. 18-23) concerning the effectiveness of his representation at trial and on appeal, as argued in his opening brief and re-stated herein. It is further Mr. Heilman's contention that because he raised such claims, and supported them with the facts set forth in his pleadings, that summary dismissal was error.

Therefore, it is Mr. Heilman's contention that his post-conviction petition, and at least a hearing thereon, should have been allowed.

#### **IV. CONCLUSION**

Based on the above, Mr. Heilman respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief, and remand the matter for further hearings.

DATED this 26 day of October, 2014.

A handwritten signature in black ink, appearing to read 'Stephen D. Thompson', written over a horizontal line.

STEPHEN D. THOMPSON  
Attorney for Petitioner/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27 day of October, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

Kenneth K. Jorgensen  
Deputy Attorney General  
Criminal Division  
Post Office Box 83720  
Boise, Idaho 83720-0010

  
\_\_\_\_\_  
STEPHEN D. THOMPSON  
Attorney for Defendant/Appellant